

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
(Before Owens, P.J., and Markey and Murray, JJ.)

PRESERVE THE DUNES, INC.,
a Michigan Not For Profit Corporation,

Plaintiff-Appellee,

v

**MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY and
TECHNISAND, INC.,** a Delaware
Corporation,

Defendants-Appellants.

Docket Nos. 122611, 122612

Court of Appeals No. 231728

Berrien County Trial Court
Case No. 98-3789-CE-S

**SUPPLEMENTAL BRIEF ON APPEAL --
PLAINTIFF-APPELLEE PRESERVE THE DUNES, INC.**

ORAL ARGUMENT REQUESTED

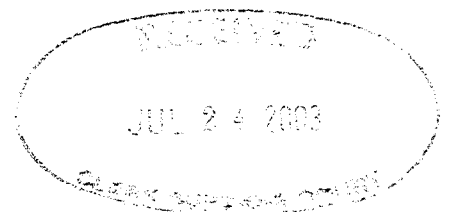
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**The Appeal Involves a Ruling that a Provision of the Constitution, a
Statute, Rule or Regulation, or Other State Governmental Action is Invalid**



**Supplemental Brief on Appeal --
Plaintiff-Appellee Preserve the Dunes, Inc.**

Plaintiff-Appellee Preserve the Dunes, Inc. brings to this Court's attention the case of *Attorney General v Harkins*, ____ Mich App ____; ____ NW2d ____; 2003 WL 21673563 (No 227720, July 17, 2003, copy attached). *Harkins* holds that the six-year statute of limitations in MCL 600.5813¹ applies to all equitable actions brought pursuant to the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq* (NREPA). The Michigan Environmental Protection Act (MEPA), Part 17 of NREPA, contains no limitation period. Thus, the rule declared in *Harkins* means that equitable actions under MEPA, including Preserve the Dunes' action in this case, are governed by the six-year limitation period prescribed in MCL 600.5813. Preserves the Dunes' action was filed 19 months after the permit in question was granted, and is therefore timely under *Harkins*.

If the holding in *Harkins* is correct, it completely answers defendants' suggestions² in this case that the Court of Appeals decision below leaves administrative permits open to a MEPA challenge indefinitely. Significantly, in contrast to its position in this case that the DEQ can disregard the Legislature's command, the DEQ in *Harkins* attempted to vigorously pursue a permit violation eight years after the violation occurred.

If *Harkins* is not correct, then Preserve the Dunes' action was timely filed for the reasons stated in its brief on appeal. *Harkins*' characterization of the Court of Appeals decision in this case is erroneous. The *Harkins*' panel asserts that the panel below held that no statute of

¹ "All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes." MCL 600.5813.

² Technisand brief at 24; DEQ brief at 24.

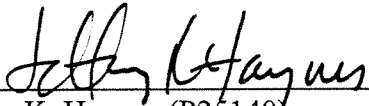
limitation applies to agencies' authority to issue permits.³ To the contrary, the panel below held that Preserve the Dunes' action was filed timely because MEPA contains no limitations period.⁴

Respectfully submitted,

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Dated: July 23, 2003

³ *Harkins, supra*, slip opinion at 4 n 4.

⁴ *Preserve the Dunes, Inc. v Dep't of Environmental Quality*, 253 Mich App 263, 293; 655 NW2d 263 (2002).

STATE OF MICHIGAN
COURT OF APPEALS

ATTORNEY GENERAL and DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Plaintiffs-Appellants,

v

DONALD L. HARKINS,

Defendant-Appellee.

FOR PUBLICATION

July 17, 2003

9:00 a.m.

No. 227720

Oakland Circuit Court

LC No. 96-520092-CE

ATTORNEY GENERAL and DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Plaintiffs-Appellees,

v

DONALD L. HARKINS,

Defendant-Appellant.

No. 232934

Oakland Circuit Court

LC No. 96-520092-CE

Before: Zahra, P.J., and Murray and Fort Hood, JJ.

ZAHRA, P.J.

In Docket No. 227720, plaintiffs, the Michigan Attorney General and the Michigan Department of Environmental Quality (MDEQ) (collectively referred to in the singular as plaintiff), appeal as of right from an order granting summary disposition to defendant, Donald J. Harkins, which dismissed plaintiff's equitable action to restore wetlands that were altered in violation of a permit issued under Part 303 (Wetland Protection) of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.30301 *et seq.* In Docket No. 232934, defendant appeals as of right from the trial court's order denying his request for attorney fees and costs for defending against plaintiff's allegedly frivolous action. These cases were consolidated for purposes of appeal. We conclude plaintiff's action is barred by the six-year statute of

limitations found at MCL 600.5813.¹ We further conclude that the trial court did not clearly err when it found that plaintiff's action was not frivolous. We affirm.

I. Facts and Procedure

In 1987, defendant applied for a permit to fill in certain portions of his lakefront lot, which measured approximately one-tenth of an acre, for the creation of a beachfront. Plaintiff denied defendant's original permit application and defendant appealed that decision. While his appeal was pending, defendant accepted plaintiff's offer for a more limited permit, which was issued on March 15, 1988 (the modified permit). Defendant asserts that he completed his work on the property in 1988. On May 9, 1990, an administrative law judge affirmed plaintiff's denial of defendant's original permit application. That decision was affirmed by this Court in *Harkins v Dep't of Natural Resources*, 206 Mich App 317; 520 NW2d 653 (1994), which noted that a modified permit had been issued and concluded that no compensable "taking" had occurred. The Supreme Court denied leave to appeal.

On August 28, 1990, plaintiff investigated a report that defendant had developed his property in violation of the modified permit. Defendant met with John Jurcich of the Department of Natural Resources, who concluded in his report that the work appeared to be within the guidelines of the modified permit. Notwithstanding the conclusion reflected in Jurcich's report, on August 8, 1991, plaintiff issued a cease and desist order against defendant, alleging defendant's work on the property did not conform with what was authorized by the modified permit. The order prompted a criminal prosecution against defendant under the provisions of the former Wetland Protection Act, MCL 28.714, and the Inland Lakes and Streams Act, MCL 28.1951 *et seq.* On April 4, 1992, a district court judge dismissed the criminal action. Plaintiff did not appeal this dismissal.

On March 28, 1996, plaintiff filed this action seeking an injunction to require defendant to restore the wetlands and lake bottom and alleging that defendant had filled or dredged the wetlands in violation of the modified permit. Plaintiff also requested civil fines. Defendant eventually moved for summary disposition.² On April 12, 2000, the trial court issued an opinion and order granting defendant summary disposition of plaintiff's action under MCR 2.116(C)(10) (no genuine issue of material fact) and MCR 2.116(C)(7) (statute of limitations), and dismissing plaintiff's complaint. Defendant subsequently filed a motion for attorney fees and costs,

¹ Defendant also raises various issues regarding the constitutionality of the NREPA, which were never addressed by the trial court. We decline to consider defendant's constitutional claims "because this Court's review is limited to the record developed by the trial court." *Harkins v Dep't of Natural Resources*, 206 Mich App 317, 323; 520 NW2d 653 (1994). In any event, we need not resolve the constitutional claims because we find merit to defendant's statute of limitations argument.

² The trial court previously granted defendant summary disposition on January 15, 1997, on the ground that plaintiff filed an untimely brief in opposition to defendant's motion for summary disposition. This Court reversed the dismissal as "too harsh a remedy" and reinstated plaintiff's action in *Attorney General v Harkins*, unpublished opinion per curiam of the Court of Appeals, issued July 7, 1998 (Docket No. 202323).

claiming that plaintiff's action was vexatious, lacked a factual basis, and was filed with intent to harass. Following a hearing on October 26, 2000, the trial court denied defendant's motion.

II. Analysis

A. Docket No. 227720: Statute of Limitations

The trial court found that the six-year period of limitations set forth in MCL 600.5813 barred plaintiff's injunctive action to enforce the permit and restore the wetlands in question. Specifically, the trial court observed that defendant's alteration to the wetlands were completed in 1988. This action was commenced eight years after the wetlands were altered. The trial court concluded that plaintiff's equitable action was therefore barred by the six-year statute of limitations. MCL 600.5813.

The applicability of a statute of limitations is a question of law that we review de novo. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340-341; 573 NW2d 637 (1997). Statutes of limitation are procedural devices intended to promote judicial economy and protect the rights of defendants through the prevention of litigation of stale claims. *Stephens v Dixon*, 449 Mich 531, 534; 536 NW2d 755 (1995). Michigan courts have never addressed whether MCL 600.5813 applies to equitable actions brought under the NREPA.

Defendant argues on appeal that the six-year limitations period contained in MCL 600.5813 bars plaintiff's claim. Judicial interpretation of a statute requires that effect be given to the plain meaning of the words used by the Legislature in the statute under review. *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 107; 649 NW2d 383 (2002). If the language of the statute is clear, then the statute will be enforced as written. *Id.* "Unless otherwise defined in the statute, or understood to have a technical or peculiar meaning in the law, every word or phrase of a statute will be given its plain and ordinary meaning." *Id.*

MCL 600.5813 provides, "[a]ll other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes."³ Black's Law Dictionary (6th ed) defines "personal action" as follows: "In civil law, an action *in personam* seeks to enforce an obligation imposed on the defendant by his contract or delict; that is, it is the contention that he is bound to transfer some dominion or to perform some service or to repair some loss." *See also* 1 Am Jur 2d, Actions, § 38, p 572 ("Personal actions are those brought for the specific recovery of goods and chattels, or for damages or other redress for breach of contract or other injuries, of whatever description, the specific recovery of lands, tenements, and hereditaments only excepted").

Here, plaintiff brought a civil action against defendant, an individual who allegedly failed to comply with the prohibitions or conditions of Part 303 of the NREPA. Plaintiff's injunctive action to require defendant to restore the wetland comes within the meaning of a "personal action" as defined in MCL 600.5813, because it seeks to "repair some loss." Actions brought by government departments on behalf of the Attorney General are deemed personal actions. See

³ MCL 600.5813 applies "equally to all actions whether equitable or legal relief is sought." MCL 600.5815.

Great Lakes Gas Transmission Co v State Treasurer, 140 Mich App 635, 650; 364 NW2d 773 (1985).

Further, as both parties acknowledge, there is no statute of limitations specified in the NREPA. While MCL 324.30316 provides for the commencement of a civil action by the Attorney General to seek “appropriate relief, including injunctive relief” for permit violations, it does not state a period of limitation for bringing such actions. The Revised Judicature Act specifies that MCL 600.5813 is the general statute of limitations applying to “[a]ll other personal actions . . . unless a different period is stated in the statutes.” This Court has held that “a civil cause of action arising from a statutory violation is subject to the six-year limitations period found in § 5813, if the statute itself does not provide a limitation period.” *DiPonio Constr Co v Rosati Masonry Co*, 246 Mich App 43, 56; 631 NW2d 59 (2001). There being no period of limitation expressly applicable to actions brought under the NREPA, the general limitation provisions of MCL 600.5813 apply.⁴

Plaintiff, citing *Taylor v S.S. Kresge*, 332 Mich 65, 75; 50 NW2d 851 (1952), argues that statutes of limitations are not applicable to equitable actions such as the claim asserted by plaintiff in this case. *Taylor* does indeed hold that statutes of limitation do not apply to equitable actions. However, subsequent to the Supreme Court’s decision in *Taylor*, the Michigan Legislature enacted MCL 600.5815, which provides that “[t]he prescribed period of limitations shall apply equally to all actions whether equitable or legal relief is sought. . . .” Thus, the Michigan Legislature’s action of expressly stating that Michigan’s statutes of limitations apply to equitable actions essentially rendered moot that portion of the Supreme Court’s decision in *Taylor*.

Having determined that the six-year statute of limitations applies to this cause of action, we must next determine when the claim accrued. The accrual provision in MCL 600.5827 provides that “the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.” In the present case, plaintiff granted defendant the modified permit on March 15, 1988. Defendant completed his work on the property in 1988. Plaintiff filed the instant action on March 28, 1996. Plaintiff alleges that defendant was in violation of the modified permit issued to him on March 15, 1988. Consequently, more than six years passed between the time the purported violation occurred in 1988 and the time the claim was filed on March 28, 1996.

We find unpersuasive plaintiff’s claim that the limitation period is tolled by defendant’s continuous wrongful acts. “The continuing-wrongful-acts doctrine states that ‘where a

⁴ To the extent that *Preserve the Dunes, Inc v Dep’t of Environmental Quality*, 253 Mich App 263, 303-304; 655 NW2d 263 (2002), lv gtd 468 Mich 869 (2003), holds that an agency’s authority to issue a permit is not limited by any statute of limitations because no time limitation exists either with an MEPA action or within the SDMA, Part 637 of the NREPA, we find this holding factually distinguishable from the case at hand. *Preserve the Dunes, Inc, supra*, contemplates whether a statute of limitations exists regarding an agency’s authority to issue a permit. By contrast, the present case deals with the Attorney General’s ability to commence a civil action against a “person who willfully or recklessly violates a condition or limitation in a permit issued” by a department. MCL 324.30316(3).

defendant's wrongful acts are of a continuing nature, the period of limitation will not run until the wrong is abated; therefore, a separate cause of action can accrue each day that defendant's tortious conduct continues.' " *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 81; 592 NW2d 112 (1999) quoting *Horvath v Delida*, 213 Mich App 620, 626; 540 NW2d 760 (1995). However, "a continuing wrong is established by continual tortious acts, not by continual harmful effects from an original completed act." *Horvath, supra* at 627 (emphasis in original). Defendant is alleged to have committed a wrongful act in 1988, when he developed his property in a way that plaintiff now claims was in violation of the modified permit. Once defendant developed the property in question, his alleged wrongful conduct ceased. The effects of the work defendant performed on the property in 1988 are the basis of this 1996 suit. These effects resulted from a non-continuous act, the property development, which occurred in 1988. Consequently, we conclude that defendant's actions simply do not fall within the ambit of the continuing-wrongful-acts doctrine and plaintiff's reliance on this doctrine is misplaced.

Plaintiff further contends that defendant was involved with additional dredging in 1991 while attempting to comply with the cease and desist order issued by plaintiff on August 8, 1991. Plaintiff alleges that this act in 1991 was a "continuing wrongful act" that tolled the statute of limitations until 1997. We disagree.

Defendant was granted a permit to construct a ten-foot wide pathway. Defendant stated in his affidavit that in 1989 or 1990, the pathway that he constructed pursuant to the modified permit eroded and may have "spread as much as two feet on either side." In August 1991, defendant received a cease and desist order to remove the access path in "excess of 10' wide" by September 8, 1991, or corrective action would be ordered. Defendant then admittedly dredged a four-foot strip and removed the excess sand from the pathway and allowed the wetland reeds to grow back in the eroded area. Additionally, per directive of the modified permit, defendant installed sod over the sand on the pathway in order to prevent further erosion.

Defendant's actions in 1991 conformed to the cease and desist order. Should we adopt plaintiff's argument, we would place defendant in the very peculiar position of having an otherwise time-barred claim revived solely because of defendant's efforts to comply with a cease and desist order issued by plaintiff. The action in 1991 taken by defendant can hardly be termed a "wrongful tortious act," but rather an attempt to comply with an order issued by plaintiff. Defendant was merely attempting to remedy an effect that occurred as a result of the installation of the pathway in 1988. Defendant's actions in this regard may result in two possible outcomes. If defendant's actions satisfied the cease and desist order, there would be no reason to pursue further proceedings of any type. Alternatively, if defendant did not comply with the order, plaintiff could have timely brought an action under the NREPA or plaintiff could have pursued contempt proceedings for failing to comply with the order. Plaintiff may not, however, do nothing for five years and then pursue otherwise time-barred claims dating back to 1988. Therefore, we conclude that defendant's attempt to comply with the cease and desist order does not equate to a wrongful tortious act within the meaning of the continuing violation doctrine.

Plaintiff also contends that the statute of limitations should not bar its action because plaintiff has not sat by idly between 1988, when it issued the modified permit, and March 1996 when it filed the complaint in this action to restore the wetlands. Specifically, plaintiff claims that throughout the period of time that defendant litigated plaintiff's denial of the original permit, plaintiff attempted to enforce its modified permit and obtain restoration of the wetlands in a

criminal action brought in the district court. However, plaintiff did not have to wait until the Supreme Court denied defendant's application for leave to appeal the denial of the original permit before instituting a civil suit against defendant for violations of the modified permit. The fact that plaintiff filed a criminal action in the district court against defendant to enforce its permit underscores the fact that plaintiff could have timely filed a civil action against defendant for violating the modified permit. Plaintiff simply chose not to do so. There simply is no link between defendant's attempts to reverse on appeal plaintiff's denial of the original permit and plaintiff's failure to prosecute the instant action in a timely fashion. Cf. *Gebhardt v O'Rourke*, 444 Mich 535, 554; 510 NW2d 900 (1994) (holding that "successful postconviction relief is not a prerequisite to the maintenance of a claim for legal malpractice arising out of negligent representation in a criminal matter").

B. Docket No. 232934: Attorney Fees and Costs

Defendant appeals the denial of costs and attorney fees as a sanction for the pursuit of frivolous claims by plaintiff. We find no clear error in the trial court's determination that defendant was not entitled to attorney fees and costs under either MCR 2.114 or MCR 2.625. A trial court's finding that a claim or defense was frivolous will not be reversed on appeal unless clearly erroneous. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002); *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Kitchen, supra* at 661-662.

Every document of a party represented by an attorney must be signed by at least one attorney of record, which constitutes a certification that: (1) the signor has read the document; (2) to the best of the signor's knowledge, information and belief after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. MCR 2.114(D). If a pleading is signed in violation of MCR 2.114, the party or attorney or both must be sanctioned. MCR 2.114(E). In addition, a party pleading a frivolous claim is subject to costs under MCR 2.625(A)(2). MCR 2.114(F). The frivolous claims provisions impose an affirmative duty on each attorney to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed. *LaRose Mkt, Inc v Sylvan Ctr, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995). The reasonableness of the inquiry is determined by an objective standard. *Id.* The focus is upon the efforts taken to investigate a claim before filing suit, and a determination of reasonable inquiry depends on the facts and circumstances of the case. *Id.* The attorney's subjective good faith is irrelevant. *Lloyd v Avadenka*, 158 Mich App 623, 630; 405 NW2d 141 (1987). That the alleged facts are later discovered to be untrue does not invalidate a prior reasonable inquiry. *Lockhart v Lockhart*, 149 Mich App 10, 14-15; 385 NW2d 709 (1986).

We cannot conclude that the trial court clearly erred when it determined that plaintiff's legal position regarding the statute of limitations issue had arguable legal merit. This is apparently the first time that the catch-all six-year statute of limitations for "all personal actions" found in MCL 600.5813 has been applied to a case arising under the NREPA. In addition, plaintiff's tolling arguments, although rejected by both this Court and the trial court, were not so lacking in legal merit as to conclude that plaintiff's action was frivolous. Sanctions are not

required and should not be imposed merely because the legal argument advanced by a litigant is rejected by the court. Where, as here, there is no developed case law mandating a particular result, sanctions under MCR 2.114 and MCR 2.625 are not warranted.

III. Conclusion

In sum, the trial court properly granted summary disposition on the ground that the six-year period of limitations in MCL 600.5813 barred plaintiff's action. Further, we find no clear error in the trial court's decision that defendant was not entitled to attorney fees and costs. We affirm the trial court's order granting defendant summary disposition and affirm the trial court's order denying defendant costs and attorney fees.

Affirmed.

/s/ Brian K. Zahra
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood